

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7750

Petition of Lamoille County Sheriff's Department,)
Vermont Communications Board, and Vermont)
Transco LLC, for authority to install a wireless)
communications facility in Hyde Park, Vermont)

Order entered: 7/28/2011

PROCEDURAL ORDER RE: MOTIONS, COMMENTS, AND REQUEST FOR HEARING

I. INTRODUCTION AND BACKGROUND

On May 20, 2011, the Lamoille County Sheriff's Department, Vermont Communications Board, and Vermont Transco LLC (collectively, the "Petitioners"), filed a petition and prefiled testimony requesting that the Public Service Board ("Board") issue a certificate of public good ("CPG"), pursuant to 30 V.S.A. § 248a, authorizing the construction of a wireless telecommunications facility to be located in the Town of Hyde Park, Vermont (the "Project"). The Project involves construction of a new 120-foot self-supporting lattice tower and associated antennas and operating equipment near an existing 90-foot guyed tower (the "Manosh Tower") on property owned by Neil and Russell Jones (the "Jones Property") in Hyde Park, Vermont.

On June 3, 2011, the Town of Hyde Park Planning Commission filed, via e-mail, a letter with the Board stating that the Planning Commission "disapproves of the Project" because it does not comply with certain zoning bylaws listed in the letter.¹

On June 9, 2011, H.A. Manosh, Inc. ("Manosh"), the owner of the existing Jones Tower, filed comments in opposition to the petition.

On June 10, 2011, the Vermont Department of Public Service filed a letter with the Board recommending that the Board issue an order approving the Project without further hearing or investigation.

1. Planning Commission letter at 1.

On June 10, 2011, David L. Grayck, Esq., Cheney, Brock & Saudek, P.C., submitted a combined filing comprised of comments in opposition to the Project, motions to intervene, and a request for hearing on behalf of James Allister, Frederic Gluck, Gerette Buglion, Colyn Case, Nancy Case, John Clark, Judy Clark, Lisa Dimondstein, Mark Dimondstein, Melissa Dimondstein, Mary Miller, and Michael Ryan (together, the "Neighbors"), neighboring landowners to the parcel on which the Project is proposed to be located. The Neighbors also filed affidavits, prefiled testimony and exhibits in support of their opposition to the Project, including testimony from Jean Vissering addressing aesthetic impacts.

On June 20, 2011, the Petitioners filed a response to the letter submitted by the Hyde Park Planning Commission.

On June 27, 2011, the Petitioners filed a response to the combined filing of the Neighbors and the comments filed by Manosh. In addition, the Petitioners filed a motion to strike certain testimony and exhibits submitted by the Neighbors in support of their combined filing.

On June 27, 2011, David L. Grayck, Esq., filed a notice of withdrawal as counsel for the Neighbors.

On July 5, 2011, the Hyde Park Planning Commission filed a reply to the Petitioners' response to the Planning Commission's letter.

On July 5, 2011, Daniel Richardson, Esq., Tarrant, Gillies, Merriman & Richardson, filed a notice of appearance on behalf of the Neighbors and a motion for extension of time until July 20, 2011, to reply to the Petitioners' response to the Neighbors' combined filing.

On July 5, 2011, Manosh filed a request for permission to file surreply, a surreply to Petitioners' response to Manosh's opposition, and a motion to intervene in the proceeding.

On July 11, 2011, Petitioners filed a response to the Neighbors' motion for extension of time.

On July 15, 2011, Petitioners filed a response to Manosh's request for permission to file surreply, surreply to Petitioners' response to Manosh's opposition, and motion to intervene in the proceeding.

On July 22, 2011, the Neighbors filed a surreply to the Petitioners' response to their combined filing.

II. PROCEDURAL ISSUES

Comments

The Neighbors and Manosh contend that the petition should be denied because it will have an undue, adverse impact on aesthetics as evidenced by the Hyde Park Planning Commission statement that it disapproves of the Project and the aesthetic analysis of Jean Vissering. The Neighbors maintain that the decision of the Planning Commission to "disapprove" of the Project "alone provides sufficient basis for the Board to deny this petition."² The Neighbors also contend that the prefiled testimony, exhibits, and conclusions of Jean Vissering regarding the aesthetic impacts of the Project in addition to the affidavits of the Neighbors, demonstrate that the Project "will have an undue adverse effect on aesthetics and scenic beauty."³ Manosh asserts that it continues to use its existing tower on the Jones property and that it "has no present intention to remove its existing tower from the subject property."⁴ Manosh further maintains that the Project will have an undue adverse impact on aesthetics "which will be compounded by the fact that it will be the second tower constructed on the subject property."⁵ In addition, the Neighbors argue that the Project is "substantially the same facility," as one previously proposed for a different site located approximately one-half mile from the Project site.⁶ The Neighbors contend that because that previously proposed facility was denied a permit under Act 250 in 1999, the Board is "barred" from considering the petition pursuant to 30 V.S.A. § 248a(h).⁷

2. Neighbors Combined Filing at 5.

3. *Id.* at 6.

4. Manosh Comments at 1.

5. *Id.* at 2.

6. *Id.* at 9.

7. *Id.*

Petitioners contend that, contrary to the Neighbors' and Manosh's assertions, the Project will not have an undue adverse aesthetic impact on the surrounding area.⁸ Petitioners maintain that their own aesthetic analysis shows that the Project will have adverse aesthetic impacts, but those impacts will not rise to the level of undue.⁹ Petitioners also argue that the Project is not barred from consideration by the Board pursuant to § 248a(h) because the Project is not substantially the same as the previously proposed facility and that Petitioners were not the applicants for the previously proposed facility.¹⁰

Pursuant to § 248a(h):

An applicant that has obtained or been denied a permit or permit amendment under the provisions of Title 24 or chapter 151 of Title 10 for the construction of a telecommunications facility may not apply for approval from the board for the same or substantially the same facility, except that an applicant may seek approval for a modification to such a facility.

In this case, the instant Project and the previously denied facility differ significantly. The two facilities are substantially different in location, size, antenna configuration, and access. The two facilities are similar only in that they are both telecommunications facilities proposed for the same geographic region. Therefore, the facilities cannot be considered "substantially the same" and the Petitioners are not barred from applying for approval from the Board.

With respect to the aesthetic impacts of the Project, I conclude that, based upon the affidavits, prefiled testimony and exhibits filed by the Neighbors, that the Neighbors have demonstrated that the Project has the potential to cause undue adverse aesthetic impacts on the surrounding area, and, accordingly, raises a significant issue with respect to aesthetics.¹¹ Therefore, because the Project raises a significant issue, with respect to aesthetics, I will hold an evidentiary hearing on this issue.

8. Petitioners Response to Combined Filing at 12.

9. *Id.* at 12-13.

10. *Id.* at 4-12.

11. However, I further conclude that the comments submitted by Manosh do not demonstrate that the Project will raise a significant issue with respect to aesthetics.

Neighbors' Motions to Intervene

Each of the Neighbors requests to be granted intervention in these proceedings pursuant to Board Rule 2.209. Each of the Neighbors own property in the vicinity of the proposed Project. In support of their respective motions, each of the Neighbors claim that the Project will be visible from their respective properties, will negatively impact views from their property, and will have a negative aesthetic impact on the surrounding area.¹² Therefore, the Neighbors argue that they each have a substantial interest in the outcome of this proceeding, this proceeding provides the only means by which they can protect that interest, this interest is not represented by any other party to this proceeding, and their participation will not result in undue delay.¹³

The Petitioners, in their response to the combined filing, do not specifically object to the Neighbors' motions to intervene other than to note that the concerns expressed by the Neighbors regarding impacts on private views "are not cognizable within the Board's jurisprudence concerning an aesthetics analysis."¹⁴ Accordingly, the Petitioners argue, the scope of intervention should be limited "to concerns over public views." ¹⁵

In accordance with Board Rule 2.209, persons who seek to intervene must demonstrate an interest which may be adversely affected by the outcome of the proceeding. In this case, the Neighbors have provided a sufficient demonstration in support of their contention that the Project may result in the impacts they describe. Therefore, the Board grants the Neighbors permissive intervention, pursuant to Board Rule 2.209(B), limited to the concerns expressed in the respective motions to intervene.

Manosh Motion to File Surreply, Surreply, and Motion to Intervene

The Project is proposed to be located on the Jones Property near the existing Manosh Tower, which was constructed on the Jones Property prior to 1970. The Petitioners have elected

12. *See* Neighbors Combined Filing at 17-38.

13. *Id.* at 38-40.

14. Petitioners Response to Neighbors Combined Filing at 20.

15. *Id.*

to build a new telecommunications facility on the same parcel, rather than utilize the existing Manosh Tower. In response to Manosh's comments regarding the increased aesthetic impacts of locating a second tower at this location, Petitioners state that they "would be amenable to a condition in the Certificate of Public Good requiring removal of the Jones Tower within a given timeframe . . ." ¹⁶ In its surreply, Manosh contends that it "has made numerous offers to Petitioners to allow Petitioners to replace the Manosh Tower with one that they own and control, but Petitioners have instead sought . . . to force the removal of the Manosh Tower rather than negotiate a mutually beneficial arrangement." ¹⁷ Further, Manosh maintains that the "Board lacks jurisdiction and authority to order the removal of the Manosh Tower." ¹⁸ Manosh argues that [d]ue to the extraordinary nature of the proposed relief sought by Petitioners – a requirement that Manosh remove the Tower," it should be granted intervention pursuant to Board Rule 2.209. ¹⁹

Petitioners argue that they are not seeking any extraordinary relief as claimed by Manosh, and that because Manosh has failed to articulate any other valid basis on which to file a surreply or to intervene, Manosh's motions should be denied. ²⁰ The Petitioners also state that they "are in complete agreement with Manosh's assertion that the Board does not have jurisdiction to resolve a property dispute." ²¹

Manosh's characterization of the Petitioners' comments as a request for relief is incorrect. The Petitioners statement that they would be "*amenable*" to such a condition, if imposed by the Board, does not amount to a request for relief, nor do I interpret it as such. Further, both the Petitioners and Manosh acknowledge that the underlying property dispute between Manosh and the Petitioners over the removal of the existing tower is beyond the Board's jurisdiction. Therefore, because the Petitioners have not sought the relief described by Manosh, and this

16. Petitioners Response to Combined Filing at 22.

17. Manosh Surreply at 5.

18. *Id.* at 6.

19. *Id.*

20. Petitioners Response to Manosh Surreply at 3.

21. *Id.* at 2.

represents the only basis for its motions to file surreply and motion to intervene, the motions are denied without prejudice. Should the Petitioners in the future request the type of relief described here, Manosh will have an opportunity to renew its motions at that time.

Motion to Strike and Motion for Extension of Time

Petitioner argues that portions of the prefiled testimony and exhibits submitted by Jean Vissering on behalf of the Neighbors should be stricken from the evidentiary record because they are not "fair and accurate representations of Petitioners' proposed communications tower" and, therefore, "the prejudicial effect of these exhibits outweighs their probative value."²²

It is clear that the Petitioners have different opinions regarding the accuracy of the testimony than the Neighbors. However, it is not clear from the Petitioners' motion that the testimony and exhibits are completely irrelevant to this proceeding. In addition, the Petitioners will have an opportunity to cross-examine Ms. Vissering during the evidentiary hearing and present arguments regarding the weight that should be afforded this testimony. Therefore, the motion to strike is denied.

Neighbors Surreply Comments

In their surreply to the Petitioners' response to the Neighbors' combined filing, the Neighbors reiterate their contention that the Project should be denied because it is substantially the same as a facility previously denied an Act 250 permit.²³ In the alternative, the Neighbors request that the present proceedings be stayed until the underlying property dispute between Manosh and the Petitioners is resolved. The Neighbors also seek permission to present expert testimony on "variations available" that will reduce the Project's aesthetic impact.²⁴ Finally, the Neighbors argue that recent statutory amendments regarding the timeline for Board decisions

22. Petitioners Motion to Strike at 1.

23. Neighbors Surreply 5-7.

24. *Id.* at 5.

under § 248a "cannot retroactively alter the position of parties during the course of a proceeding so as to grant new rights." ²⁵

As discussed above, I have concluded that the Project is not substantially the same as the previously proposed facility and, therefore, I decline to deny the petition on these grounds. With respect to the underlying property dispute, also discussed above, that dispute is beyond the Board's jurisdiction and its resolution does not bar the Board's review of this petition under § 248a. Therefore, I see no reason to delay this proceeding until the property dispute is resolved. With respect to the Neighbors' request to submit expert testimony on available alternatives, the request is granted to the extent the testimony is within the Neighbors' limited scope of intervention, which is limited to aesthetic issues, as set forth above. Finally, I conclude that the Neighbors are correct in asserting that the recent statutory amendments are not retroactive and, therefore, the Board's review of the Project will take place in accordance with the statutory timelines in existence at the time the petition was filed.

SO ORDERED.

25. *Id.* at 7-8.

Dated at Montpelier, Vermont, this 28th day of July, 2011.

s/Gregg Faber

Gregg Faber
Hearing Officer

OFFICE OF THE CLERK

FILED: July 28, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)